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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON

8 SARA ANN THOMPSON,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting
12 Commissioner of Social Security,¹

13 Defendant.

NO. C16-5762-RBL-JPD

REPORT AND
RECOMMENDATION

14 Plaintiff Sara Ann Thompson appeals the final decision of the Commissioner of the
15 Social Security Administration (“Commissioner”) that denied her application for Supplemental
16 Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-83f,
17 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,
18 the Court recommends that the Commissioner’s decision be REVERSED and REMANDED
19 for further administrative proceedings.

20 I. FACTS AND PROCEDURAL HISTORY

21 Plaintiff is a 28-year-old woman with a high school diploma, with special education.
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23 ¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security
24 Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is
substituted for Carolyn W. Colvin as defendant in this suit. The Clerk is directed to update the
docket, and all future filings by the parties should reflect this change.

1 Administrative Record (“AR”) at 214. Plaintiff has never been gainfully employed. AR at
2 545.

3 In March 2011, Plaintiff protectively filed a claim for SSI payments, alleging an onset
4 date of July 5, 1988.² AR at 198-203, 209. Plaintiff asserts that she is disabled due to
5 depression, post-traumatic stress disorder, attention deficit hyperactivity disorder, and fetal
6 alcohol effect. AR at 213.

7 The Commissioner denied Plaintiff’s claim initially and on reconsideration. AR at 113-
8 20, 127-33. Plaintiff requested a hearing, which took place on May 15, 2012. AR at 40-87.
9 On June 16, 2012, the ALJ issued a decision finding Plaintiff not disabled and denied benefits
10 based on her finding that Plaintiff could perform a specific job existing in significant numbers
11 in the national economy. AR at 21-34. Plaintiff’s administrative appeal of the ALJ’s decision
12 was denied by the Appeals Council, AR at 1-9, making the ALJ’s ruling the “final decision” of
13 the Commissioner as that term is defined by 42 U.S.C. § 405(g).

14 Plaintiff sought judicial review, and the U.S. District Court for the Western District of
15 Washington reversed the ALJ’s decision and remanded for further proceedings. AR at 639-51.
16 The ALJ held a second hearing on September 17, 2015. AR at 554-605. The ALJ
17 subsequently again found Plaintiff not disabled. AR at 534-46. On September 6, 2016,
18 Plaintiff timely filed the present action challenging the Commissioner’s decision. Dkt. 1.

19 II. JURISDICTION

20 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§
21 405(g) and 1383(c)(3).

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23
24 ² At the first administrative hearing, Plaintiff amended her alleged onset date to March
21, 2011. AR at 43-44.

1 III. STANDARD OF REVIEW

2 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
3 social security benefits when the ALJ's findings are based on legal error or not supported by
4 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
5 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
6 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
7 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
8 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
9 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
10 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
11 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
12 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
13 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
14 must be upheld. *Id.*

15 The Court may direct an award of benefits where "the record has been fully developed
16 and further administrative proceedings would serve no useful purpose." *McCartey v.*
17 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
18 (9th Cir. 1996)). The Court may find that this occurs when:

19 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
20 claimant's evidence; (2) there are no outstanding issues that must be resolved
21 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

22 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
23 erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Ms. Thompson bears the burden of proving that she is disabled within the meaning of the Social Security Act (the “Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R. §§ 404.1520(b), 416.920(b).³ If she is, disability benefits are denied. If she is not, the Commissioner proceeds to step two. At step two, the claimant must establish that she has one or more medically severe impairments, or combination of impairments, that limit her physical or mental ability to do basic work activities. If the claimant does not have such impairments,

³ Substantial gainful activity is work activity that is both substantial, i.e., involves significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. § 404.1572.

1 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
2 impairment, the Commissioner moves to step three to determine whether the impairment meets
3 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
4 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
5 twelve-month duration requirement is disabled. *Id.*

6 When the claimant's impairment neither meets nor equals one of the impairments listed
7 in the regulations, the Commissioner must proceed to step four and evaluate the claimant's
8 residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
9 Commissioner evaluates the physical and mental demands of the claimant's past relevant work
10 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
11 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
12 true, then the burden shifts to the Commissioner at step five to show that the claimant can
13 perform other work that exists in significant numbers in the national economy, taking into
14 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§
15 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the
16 claimant is unable to perform other work, then the claimant is found disabled and benefits may
17 be awarded.

18 V. DECISION BELOW

19 On December 22, 2015, the ALJ found:

- 20 1. The claimant has not engaged in substantial gainful activity since
21 March 21, 2011, the application date.
- 22 2. The claimant's affective disorder, anxiety disorder, learning disorder,
23 degenerative disc disease and obesity are severe impairments.
- 24 3. The claimant does not have an impairment or combination of
impairments that meets or medically equals the severity of one of the
listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1.

- 1 4. The claimant has the RFC to perform light work as defined in 20
2 C.F.R. § 416.967(b), with additional limitations. She can frequently
3 climb ramps and stairs. She can frequently crouch, crawl, kneel,
4 stoop, or balance. She can occasionally climb ladders, ropes, or
5 scaffolds. She has sufficient concentration to understand, remember,
6 and carry out simple, routine tasks. She can maintain concentration
7 and pace in two hour increments with usual and customary breaks for
8 eight-hour workdays. She can have superficial and occasional
9 interaction with the general public. She can work in the same work
10 environment but not in close coordination with co-workers. She can
11 interact with supervisors occasionally and with occasional interaction
12 can respond appropriately to supervisor criticism. She requires
13 occasional supervision with supervisors. She can adapt to simple
14 workplace changes as are routinely found in unskilled work involving
15 simple routine tasks. GED levels in language should not exceed a 2
16 and have verbal aptitude in the 1-5% level.
- 17 5. The claimant has no past relevant work.
- 18 6. Considering the claimant's age, education, work experience, and RFC,
19 there are jobs that exist in significant numbers in the national economy
20 that she can perform.
- 21 7. The claimant has not been under a disability, as defined in the Act,
22 since March 21, 2011, the date the application was filed.

23 AR at 537-546.

24 VI. ISSUES ON APPEAL

The principal issues on appeal are:

- 1 1. Did the ALJ err in discounting the opinions of examining psychologist Daniel
2 Neims, Psy.D.?
- 3 2. Did the ALJ err in failing to call a medical expert regarding the issue of medical
4 equivalence?

5 Dkt. 9 at 1.

6 VII. DISCUSSION

7 A. The ALJ did not err in failing to call a medical expert.

8 Plaintiff argues that the ALJ should have called a medical expert to testify at the
9 administrative hearing, given that the record contained updated information since the State

1 agency consultants last reviewed it. Dkt. 9 at 3-9. Plaintiff contends that the updated
2 information suggested that Plaintiff's mental impairments were medically equivalent to a
3 Listed impairment, and therefore the ALJ should have called a medical expert to consider that
4 new information. *Id.*

5 Plaintiff cites no authority requiring an ALJ to call a medical expert under the
6 circumstances of this case. She cites agency guidance indicating that an ALJ *may* call a
7 medical expert if the ALJ finds that additional medical evidence obtained may change the
8 opinion of State agency consultants regarding medical equivalency, but that agency ruling does
9 not require an ALJ to do so in the absence of such a finding. *See* Social Security Ruling 96-6p,
10 1996 WL 374180 (Jul. 2, 1996).

11 Furthermore, as noted by the Commissioner, Plaintiff did not offer an argument
12 regarding equivalence at the hearing, or request that a medical expert be called. The ALJ
13 considered the new evidence that Plaintiff argues could have led to a different step-three
14 finding, and did not find that expert testimony regarding equivalence was warranted. *See* AR
15 at 536-39. Plaintiff has not shown that the ALJ abused her discretion in failing to call a
16 medical expert.

17 B. The ALJ erred in discounting Dr. Neims's opinions.

18 Dr. Neims examined Plaintiff four times, in 2011, 2012, 2013, and 2014. AR at 278-
19 94, 383-97, 743-59, 773-89. The ALJ gave "little weight" to all four of Dr. Neims's opinions,
20 finding all of the opinions to be inconsistent with "the longitudinal treatment record", mental
21 status examination results, and Plaintiff's daily activities. AR at 543-44. The ALJ also noted
22 that in 2011, Plaintiff reported to a treating provider that her depression was situational (in
23 contrast with Dr. Neims's diagnosis), and that Dr. Neims's 2012 opinion provides two different
24 ratings regarding Plaintiff's ability to understand, remember and persist in simple tasks. AR at

1 544. The ALJ further indicated that in 2013, Plaintiff reported that she only attended a
2 different evaluation because she ““wanted to cover herself”” before attending court for a
3 custody hearing. AR at 544 (AR at 765).

4 Plaintiff argues that the ALJ’s reasons for discounting Dr. Neims’s opinions are not
5 specific and legitimate. The Court will address each of the ALJ’s reasons in turn.

6 1. *Legal standards*

7 If an ALJ rejects the opinion of a treating or examining physician, the ALJ must give
8 clear and convincing reasons for doing so if the opinion is not contradicted by other evidence,
9 and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.
10 1988). “This can be done by setting out a detailed and thorough summary of the facts and
11 conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Id.*
12 (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his/her
13 conclusions. “He must set forth his own interpretations and explain why they, rather than the
14 doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).
15 Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at
16 725.

17 2. *Treatment history*

18 The ALJ found Dr. Neims’s opinions to be inconsistent with Plaintiff’s longitudinal
19 treatment history, but does not explicitly explain how her treatment history is inconsistent with
20 Dr. Neims’s opinions. The ALJ discussed Plaintiff’s mental health treatment history at another
21 point in the decision, emphasizing Plaintiff’s report that her depression was situational. *See*
22 AR at 541. The ALJ also noted that during several examinations, Plaintiff was found to have
23 either no depression and anxiety, or only mild depression and anxiety, and that her reports to
24 examiners differed from her reports to treating sources. AR at 541-42. These findings are

1 inconsistent with Dr. Neims's opinions, and constitute a specific, legitimate reason to discount
2 them.

3 3. *Examination findings*

4 In her summary of the medical record, the ALJ notes that some of Plaintiff's mental
5 status examination findings were normal, specifically her appropriate speech, normal eye
6 contact, full orientation, ability to perform serial 7s, appropriate affect, and intact recent
7 memory. AR at 541-42. The ALJ did not explain how these (or any other) mental status
8 examination findings contradicted Dr. Neims's conclusions. The Commissioner does not offer
9 any theory as to how mental status examination findings were inconsistent with Dr. Neims's
10 conclusions. Dkt. 10 at 3. This reason is not specific or legitimate, because no inconsistency
11 is identified or discernible from the ALJ's decision.

12 The ALJ also found that Dr. Neims's own findings are internally inconsistent, because
13 he rated Plaintiff's ability to understand, remember, and persist in simple tasks as "moderate,"
14 and then on another form rated the limitation as "mild." AR at 544 (referencing AR at 385,
15 395-96). As noted by Plaintiff, the two forms define "mild" and "moderate" limitation
16 differently, such that the checkbox forms are not entirely consistent themselves. *Compare* AR
17 at 385 *with* AR at 395. Accordingly, these forms are not necessarily inconsistent, and the
18 ALJ's reasoning in this regard does not support discounting Dr. Neims's opinions.

19 4. *Activities*

20 The ALJ identified activities that she found to be inconsistent with Dr. Neims's
21 opinions. Dr. Neims opined in 2012 that Plaintiff had a moderate limitation in her ability to
22 travel in unfamiliar places or to use public transportation. *See* AR at 397. The ALJ indicated
23 that Dr. Neims's opinion that she was moderately limited as to using public transportation
24 contradicted her testimony and reports that she used public transportation regularly. *See, e.g.,*

1 AR at 54, 389, 572. But the checkbox form that Dr. Neims completed asked for a rating as to
2 Plaintiff's ability to travel in unfamiliar places *or* to use public transportation, and therefore her
3 reports regarding use of public transportation addresses only part of that issue. Dr. Neims's
4 notes indicate that Plaintiff does not possess a driver's license and at times relies on her
5 mother-in-law for transportation, which supports his conclusion regarding Plaintiff's
6 limitations in that category. *See* AR at 389.

7 But the ALJ went on to explain that Plaintiff's progress related to obtaining custody
8 over one of her children demonstrates that she can communicate effectively, perform activities
9 within a schedule, and make simple decisions, in contrast to Dr. Neims's opinion that she
10 would be moderately or markedly limited in those areas. AR at 544 (referencing AR at 385,
11 396-97, 745, 775). The ALJ's finding is based on a reasonable interpretation of the record.

12 The ALJ also noted that Plaintiff reported to another provider that she was attending an
13 examination in order to "cover" herself before a custody hearing. AR at 544. The import of
14 this report in the context of Dr. Neims's opinions is not clear. This reasoning is not legitimate
15 with respect to Dr. Neims's opinions.

16 In sum, the ALJ provided some specific, legitimate reasons to discount Dr. Neims's
17 opinions, but also some invalid reasons. Dr. Neims's opinions constitute the only opinions of
18 record from either a treating or examining source pertaining to Plaintiff's ability to work, and
19 the Court cannot find that the ALJ's errors in assessing the opinions were harmless in light of
20 the value of the opinions in the context of the record. *See Marsh v. Colvin*, 792 F.3d 1170,
21 1173 (9th Cir. 2015).

22 Plaintiff's request to remedy the ALJ's errors via a finding of disability should be
23 rejected, however. The record contains conflicts — specifically the ALJ's unchallenged
24 findings discounting Plaintiff's subjective testimony — that would preclude a finding of

1 disability at this time. Accordingly, this case should be remanded for further proceedings. *See*
2 *Treichler v. Comm'r of Social Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014).


3
4 VIII. CONCLUSION

5 For the foregoing reasons, the Court recommends that this case be REVERSED and
6 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
7 instructions. A proposed order accompanies this Report and Recommendation.

8 Objections to this Report and Recommendation, if any, should be filed with the Clerk
9 and served upon all parties to this suit by no later than **April 27, 2017**. Failure to file
10 objections within the specified time may affect your right to appeal. Objections should be
11 noted for consideration on the District Judge's motion calendar for the third Friday after they
12 are filed. Responses to objections may be filed within **fourteen (14)** days after service of
13 objections. If no timely objections are filed, the matter will be ready for consideration by the
14 District Judge on **April 28, 2017**.

15 This Report and Recommendation is not an appealable order. Thus, a notice of appeal
16 seeking review in the Court of Appeals for the Ninth Circuit should not be filed until the
17 assigned District Judge acts on this Report and Recommendation.

18 DATED this 13th day of April, 2017.

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20 
21 JAMES P. DONOHUE
22 Chief United States Magistrate Judge
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24